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J. DAVID NAVARRO, Clerk  
By DEBBIE STATEN  
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

RIM VIEW TROUT COMPANY AND THE  
ESTATE OF EARL M. HARDY,

Petitioners/Plaintiffs,

vs.

KARL J. DREHER, in his official capacity as  
Director of the Idaho Department of Water  
Resources, and the IDAHO DEPARTMENT  
OF WATER RESOURCES, an agency of the  
State of Idaho,

Respondents/Defendants.

CASE NO. CV 0C 0307551 D

ANSWER

Fee Category: Exempt

COME NOW, defendants Karl J. Dreher, Director of the Idaho Department of Water Resources, and the Idaho Department of Water Resources, an executive agency of the State of Idaho, ("State Defendants") by and through the undersigned deputy attorney general and for their answer to the *Amended Verified Complaint And Petition For Writ of Mandate* on file herein,

admit, deny and allege as follows: State Defendants deny each and every allegation contained in said complaint, not hereafter specifically admitted.

#### RESPONSE TO GENERAL ALLEGATIONS

1. State Defendants admit the allegations contained in paragraphs I, II, III, and IV of Plaintiffs' complaint.

2. Responding to paragraph V, State Defendants deny each and every allegation contained therein except that State Defendants admit that pursuant to chapter 6, title 42, Idaho Code, it is the duty of State Defendants "to direct and control the distribution of water from all natural water sources within a water district according to the prior appropriation doctrine."

3. Responding to paragraph VI, State Defendants admit that "[t]he water sources for Plaintiffs' water rights are springs that are part of the spring complex commonly known as the 'Thousand Springs,' which are supplied by the Eastern Snake River Plain Aquifer (ESPA)." State Defendants further admit that "[t]he springs are tributary to the Snake River and are hydrologically [or hydraulically] interconnected to the ESPA." State Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations regarding the effect on Plaintiffs by junior ground water diversions and therefore deny the same.

4. Responding to paragraph VII, State Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraph and therefore deny each and every allegation contained therein.

5. Responding to paragraph VIII, State Defendants deny each and every allegation contained therein except that State Defendants admit that at times the water supply from the springs that supply the Plaintiffs' water rights is not sufficient to fully satisfy the maximum diversion rate under Plaintiffs' water right no. 36-07167 for the Rim View Trout Company

facility and water right no. 36-07176 for the White Springs Hatchery facility, and the State Defendants are not aware of any information demonstrating that there has been sufficient water supply from the springs to supply Plaintiffs' rights continuously from January 1 to December 31 when these rights were appropriated or since. State Defendants specifically deny that they have failed to properly perform their statutory duties to administer the distribution of water within Water District No. 130.

6. Responding to paragraphs IX and X, State Defendants admit the allegations contained therein.

7. Responding to paragraph XI, State Defendants deny each and every allegation contained therein. State Defendants have applied the Conjunctive Management Rules in all circumstances where they are applicable.

8. Responding to paragraph XII, State Defendants deny each and every allegation contained therein except that State Defendants admit that Director Dreher stated in his letter of August 15, 2003, that "I plan on issuing a final order by the end of this month," and that this representation was verbally reiterated to representatives of Plaintiffs and other spring water users. State Defendants admit that Director Dreher sent a letter dated September 16, 2003, in response to a letter dated September 12, 2003, from Plaintiffs' attorney, pledging to issue a final order "as soon as I can" and explaining that circumstances beyond his control prevented him from issuing the final order earlier as planned. Director Dreher transmitted an additional letter to Plaintiffs' attorney on September 29, 2003, prior to the filing of the original complaint, stating that he anticipated "issuing an order no later than October 10, 2003." A true and correct copy of said letter is attached hereto as Exhibit A.

9. Responding to paragraph XIII, State Defendants deny each and every allegation contained therein except that State Defendants admit that Director Dreher issued an order on October 10, 2003, addressing Plaintiffs' demands for the delivery of water. State Defendants admit that the order of October 10, 2003, applies the Conjunctive Management Rules to Plaintiffs' delivery calls. State Defendants admit that the order of October 10, 2003, directs the watermasters during the term of the Interim Stipulated Agreement, which expires on December 31, 2003, "to continue administering water rights within Water Districts No. 36A and No. 130, under the supervision of the Director, in the same manner that the rights are presently being administered in accordance with the provisions of Idaho Code §§ 42-602 and 42-607, applicable rules adopted pursuant to Idaho Code § 42-603, and the directions and orders of the Director." The State Defendants deny that the order of October 10, 2003, constitutes a denial of the Plaintiffs' demands for the delivery of water.

10. Responding to paragraph XIV, State Defendants deny each and every allegation contained therein. State Defendants admit that the order of October 10, 2003, at Conclusion of Law 19, determines that the delivery call by Plaintiff Rim View Trout Company for distribution of water to water rights nos. 36-02680, 36-04032A, 36-04032B, 36-04032C, 36-04032D and 36-07167 is not recognized because based upon facility discharge measurements provided by the Plaintiffs for the years 1995 through 2002 and periodically by the watermaster in 2003 there has been a sufficient amount of water available to satisfy said water rights nos. 36-02680, 36-04032A, 36-04032B, 36-04032C, 36-04032D, and because although at times there has not been sufficient water to satisfy water right no. 36-07167, this is due to seasonal variations in spring discharge that have not been attributed to ground water diversions and use under junior priority

rights. The order further determines that there currently is adequate water available to fill water right no. 36-07167. State Defendants deny that these determinations are erroneous.

11. Responding to paragraph XV, State Defendants deny each and every allegation contained therein. State Defendants admit that the order of October 10, 2003, at Conclusion of Law 20, recognizes the delivery call by Plaintiff Estate of Earl M. Hardy for distribution of water to water right no. 36-07176 for use at the White Springs Hatchery and determines that although the flows available at the spring source currently are less than the maximum diversion rate authorized under the right, the Department's existing ground water model for the ESPA cannot accurately simulate the effects on individual spring sources caused by diversion and use of ground water from individual wells or groups of wells. State Defendants further admit that the order of October 10, 2003, determines that the 40,000 acre feet per year of replacement water for the Thousand Springs reach is determined by the Director to be adequate mitigation for the entire Thousand Springs reach for the effects of ground water diversions from the ESPA for irrigation use proximate to the Thousand Springs area during the two-year term of the Stipulated Agreement, which is deemed to be "an approved and effectively operating mitigation plan" until December 31, 2003, under Rule 42.02 of the Conjunctive Management Rules. State Defendants deny that these determinations are erroneous. Adequate mitigation beyond 2003 has not been determined and is the subject of a separate administrative proceeding currently before the State Defendants pursuant to Rule 43 of the Conjunctive Management Rules.

12. Responding to paragraph XVI, State Defendants deny each and every allegation contained therein except that State Defendants admit that Director Dreher determined that the approved mitigation plan represented by the Stipulated Agreement described in Finding of Fact 11 of the order of October 10, 2003, is adequate to mitigate injury ground water diversions from

the ESPA under junior priority rights are causing to senior surface water rights during the two-year term of the Stipulated Agreement and is based upon the best available science and data currently available. This best available science includes a computer model used to simulate the effects of ground water depletions from the ESPA coupled with the Director's professional judgment as to the quantity and time criteria reasonably supported by the model given the current uncertainties in the results from the model. State Defendants acknowledge that neither the computer model nor the Director's professional judgment are codified in statute or rule, but have been utilized and exercised in the context of a contested case proceeding subject to judicial review. State Defendants assert that they have performed all legally required actions to respond to the delivery call by Plaintiff Estate of Earl M. Hardy.

RESPONSE TO COUNT ONE (WRIT OF MANDATE)

13. State Defendants repeat their answers set forth in paragraphs 1 through 12 above.

14. Responding to paragraph XVIII, State Defendants deny each and every allegation contained therein. State Defendants have insufficient knowledge or information regarding whether Plaintiffs have sustained damages and therefore State Defendants deny the allegations regarding damages. Further, State Defendants deny that any act of the State Defendants resulted in Plaintiffs being damaged. State Defendants further deny and dispute Plaintiffs' assertion that they have no plain, adequate and speedy remedy at law.

15. Responding to paragraph XIX, State Defendants deny all allegations that they have failed to perform their duties or refused to administer water rights according to their statutory duties. State Defendants assert that they have performed their statutory duties pursuant to Idaho Code § 42-602. Further, State Defendants deny all allegations that any acts of the State Defendants resulted in the Plaintiffs sustaining damages. State Defendants have insufficient

knowledge of damages allegedly sustained by the Plaintiffs and therefore deny that Plaintiffs have been damaged or that Plaintiffs' damages can be remedied by a Court Order.

16. Responding to paragraph XX, State Defendants deny each and every allegation contained therein .

17. Responding to paragraph XXI, State Defendants deny that the "quantity" and "time" criteria relied upon by Director Dreher in approving the mitigation plan presented by the Stipulated Agreement "constitute 'rules' under the Idaho Administrative Procedure Act" and inappropriately limit the number of ground water rights subject to Plaintiffs' senior water rights. State Defendants deny that the criteria are void because they were not promulgated as rules under the Idaho Administrative Procedure Act.

18. Responding to paragraph XXII, State Defendants deny each and every allegation contained therein.

19. Responding to paragraph XXIII, State Defendants deny each and every allegation contained therein. State Defendants specifically deny that Plaintiffs are entitled to the issuance of a writ of mandate under the provisions of Idaho Code § 7-302 because State Defendants are performing their required statutory duties to administer rights to the use of water under Idaho Code § 42-602 *et seq.*

#### RESPONSE TO COUNT TWO (DECLARATORY JUDGMENT)

20. State Defendants repeat their answers set forth in paragraphs 1 through 19 above.

21. Responding to paragraph XXV, State Defendants admit the allegations contained therein.

22. Responding to paragraph XXVI, State Defendants admit that the Conjunctive Management Rules require the holders of senior surface water rights to make a delivery "call"

when asserting their senior priority over the holders of junior priority ground water rights. State Defendants deny that the time required to process such calls results in unreasonable delay in the distribution of water to senior water rights contrary to Plaintiffs' rights, Idaho law, the prior appropriation doctrine and Idaho Code § 42-602 *et seq.*

23. Responding to paragraph XXVII, State Defendants admit that the Conjunctive Management Rules place certain procedural and substantive requirements upon the holders of senior surface water rights making calls against the holders of junior ground water rights. State Defendants deny that processing delivery calls under the Conjunctive Management Rules will result in unreasonable delay. State Defendants further deny that the provisions of the Conjunctive Management Rules applied to Plaintiffs' water rights impose unlawful burdens on the Plaintiffs. State Defendants further deny that the provisions of the Conjunctive Management Rules are contrary to Plaintiffs' water rights, or Idaho law.

24. Responding to paragraph XXVIII (incorrectly numbered XXIII), State Defendants admit that Defendant Dreher's order of October 10, 2003, responded to certain letters submitted by Plaintiffs in May 2003, recognizing the letters as "calls for water delivery," and applied the Conjunctive Management Rules to those calls. State Defendants deny that application of the Conjunctive Management Rules threaten and diminish the rights of Plaintiffs and other water users.

25. Responding to paragraph XXIX, State Defendants deny each and every allegation contained therein except State Defendants admit that Director Dreher took into account an "approved and effectively operating mitigation plan" in responding to Plaintiff Estate of Earl M. Hardy's call for water rights administration.



26. Responding to paragraph XXX, State Defendants deny each and every allegation contained therein. State Defendants specifically deny that the Conjunctive Management Rules have not been applied to the administration of water rights in Water District No. 130 and other water districts, other than to the Plaintiffs' water rights.

27. Responding to paragraph XXXI, State Defendants deny each and every allegation contained therein. Specifically, State Defendants deny that Plaintiffs are entitled to an order from the Court voiding the Conjunctive Management Rules and declaring that the State Defendants' application of the Conjunctive Management Rules and the "criteria" are unconstitutional, contrary to the laws of the State of Idaho, or violate Plaintiffs' rights or Defendants' duties.

RESPONSE TO COUNT THREE (TAKING)

28. State Defendants repeat their answers set forth in paragraphs 1 through 27 above.

29. Responding to paragraph XXXIII, State Defendants deny each and every allegation contained therein. State Defendants specifically deny that the "quantity" and "time" criteria applied by Director Dreher in approving the mitigation plan provided in accordance with the Stipulated Agreement arbitrarily limits the number of ground water rights subject to Plaintiffs' senior water rights.

30. Responding to paragraph XXXIV, State Defendants deny each and every allegation contained therein.

31. Responding to paragraph XXXV, State Defendants deny each and every allegation contained therein.

## RESPONSE TO REQUEST FOR ATTORNEY FEES

32. Responding to paragraph XXXVI, State Defendants deny each and every allegation contained therein. Specifically, State Defendants deny that their direct or proximate acts resulted in Plaintiffs incurring damages and that Plaintiffs are entitled to attorneys fees and costs under Idaho Code §§ 12-117 and 12-121, and the Private Attorney General Doctrine.

### FIRST AFFIRMATIVE DEFENSE

State Defendants for their first affirmative defense allege and state:

1. Plaintiffs' *Amended Verified Complaint and Petition For Writ of Mandate* fails to state a claim upon which relief can be granted. State Defendants have fully executed their duties under the applicable statutes and rules and are fulfilling all of their legal duties relative to the distribution of water to the Plaintiffs' water rights at issue in this case. State Defendants have responded to the demands of the Plaintiffs in Director Dreher's order of October 10, 2003. With respect to the six water rights of Plaintiff Rim View Trout Company, the order determines that for five of the rights there has been a sufficient amount of water available. The order concludes that although at times there has not been sufficient water to satisfy the sixth Rim View Trout Company right, this is due to seasonal variations in spring discharge that have not been attributed to ground water diversions and use under junior priority rights. With respect to the water right of Plaintiff Estate of Earl M. Hardy for use at the White Springs Hatchery, the order concludes that although water is currently insufficient to fill the right, the Department's existing ground water model for the ESPA cannot accurately simulate the effects on individual spring sources caused by diversion and use of ground water from individual wells or groups of wells. The order further concludes, however, that the 40,000 acre feet per year of replacement water for the Thousand Springs reach is determined by the Director to be adequate mitigation for the entire Thousand

Springs reach for the effects of ground water diversions from the ESPA for irrigation use proximate to the Thousand Springs area during the two-year term of the Stipulated Agreement, expiring on December 31, 2003, which the order concludes is “an approved and effectively operating mitigation plan” under Rule 42.02 of the Conjunctive Management Rules.

### SECOND AFFIRMATIVE DEFENSE

State Defendants for their second affirmative defense allege and state:

2. The extraordinary remedy of a writ of mandate under Idaho Code § 7-303 is not available to Plaintiffs. Plaintiffs have a plain, speedy and adequate remedy available in the ordinary course of law. The Rules for Conjunctive Management of Surface and Ground Water Resources, IDAPA 37, Title 03, Chapter 11, squarely provide a plain, speedy and adequate remedy in the ordinary course of law for the holders of senior surface or ground water rights alleging injury from the diversion and use of ground water under junior rights. Plaintiffs have further failed to identify in their petition whether they seek an *Alternative or Peremptory* writ.

### THIRD AFFIRMATIVE DEFENSE

State Defendants for their third affirmative defense allege and state:

3. Plaintiffs have failed to exhaust their available administrative remedies under the Conjunctive Management Rules. On October 27, 2003, Plaintiffs filed a petition before the agency contesting the order of October 10, 2003. Plaintiffs seek extraordinary relief from the District Court without exhausting the administrative remedy provided under Rule 40 of the Conjunctive Management Rules. Rule 40 sets out the Director’s duties and describes the available remedies for a water delivery call by a senior priority surface water right holder against a junior priority ground water right holder within a water district.

REQUEST FOR ATTORNEY FEES

State Defendants are entitled to reasonable attorneys' fees and expenses, in an amount to be subsequently established, that are incurred in the defense hereof pursuant to Idaho Code §§ 12-117 and 12-121.

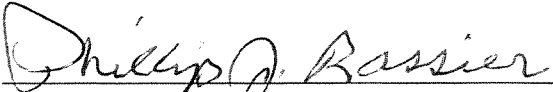
PRAYER FOR RELIEF

Wherefore, State Defendants pray for an order of the Court as follows:

1. Dismissing the Plaintiffs' Petition for Writ of Mandate;
2. Dismissing the Plaintiffs' challenge to the Conjunctive Management Rules as applied by the State Defendants to Plaintiffs' demands;
3. Denying the Plaintiffs' facial challenge to the constitutionality of the Conjunctive Management Rules;
4. Awarding the State Defendants reasonable costs and attorney fees incurred in defending against this action; and
5. For such other and further relief as the Court may deem equitable and just.

DATED this 12<sup>th</sup> day of November, 2003.

LAWRENCE G. WASDEN  
Attorney General

  
\_\_\_\_\_  
PHILLIP J. RASSIER  
Deputy Attorney General  
Idaho Department of Water Resources

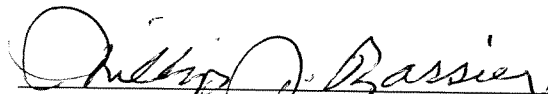
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a duly licensed attorney in the state of Idaho, employed by the Attorney General of the state of Idaho and residing in Boise, Idaho; and that I served a true and correct copy of the following described document on the persons listed below by mailing in the United States mail, first class, with the correct postage affixed thereto on this 12<sup>th</sup> day of November, 2003.

Document Served: ANSWER

Persons Served:

Daniel V. Steenson  
Charles L. Honsinger  
S. Bryce Farris  
Ringert Clark Chartered  
P.O. Box 2773  
Boise, ID 83702

  
PHILLIP J. RASSIER

# EXHIBIT A



State of Idaho

**DEPARTMENT OF WATER RESOURCES**

1301 North Orchard Street, Boise, ID 83706 - P.O. Box 83720, Boise, ID 83720-0098

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DIRK KEMPTHORNE  
Governor

KARL J. DREHER  
Director

September 29, 2003

Charles L. Honsinger  
Ringert Clark, Chartered  
455 South 3<sup>rd</sup> Street  
P. O. Box 2773  
Boise, ID 83701

VIA FACSIMILE TO (208) 342-4657 AND FIRST CLASS MAIL

Re: Update on Issuing Final Order in Response to Kay Hardy's Requests for Administration

Dear Mr. Honsinger:

It has been nearly two weeks since my last letter to you dated September 16 sent in response to your letter dated September 12 seeking issuance of the order in response to Kay Hardy's demands for administration made in mid May. I am continuing to make significant progress in completing the various evaluations necessary to issue an appropriate final order. Based on the blocks of time I have made available to finish this order, setting aside other urgent matters, I anticipate issuing an order no later than October 10, 2003.

Again, I recognize the importance and urgency of this matter to Ms. Hardy, thus the reason for this update.

Sincerely,

Karl J. Dreher  
Director

c: Kay Hardy